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NO. 178.

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SUPREME COURT U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1905.

SECURITY MUTUAL LIFE INSURANCE COMPANY, Plaintiff in Error,

vs.

HENRY R. PREWITT, Insurance Commissioner of the State of Kentucky, . . Defendant in Error.

Motion and Petition for Re-Hearing.

F. W. JENKINS,
JULIEN T. DAVIES,
CHARLES S. GRUBBS,
WM. MARSHALL BULLITT.

Counsel for the
SECURITY MUTUAL LIFE INSURANCE COMPANY,
Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1905.

No. 178.

SECURITY MUTUAL LIFE INSURANCE COMPANY . . . *Plaintiff in Error.*

vs. NOTICE.

HENRY R. PREWITT, INSURANCE COMMISSIONER OF THE STATE OF KENTUCKY . . . *Defendant in Error.*

The defendant in error, Henry R. Prewitt, Insurance Commissioner of the State of Kentucky, is hereby notified that on Monday, April 2, 1906, the plaintiff in error, the Security Mutual Life Insurance Company, will, at the opening of the court on that day, submit a motion to file petition for rehearing and brief, and in connection therewith will file affidavit of Wm. Marshall Bullitt and letter from Henry R. Prewitt, Insurance Commissioner, and will ask that said letter and affidavit be read on the hearing of said petition.

March 29, 1906.

WM. MARSHALL BULLITT,
CHAS. S. GRUBBS,
Counsel for the Security Mutual Life Insurance Company, Plaintiff in Error.

The foregoing notice is hereby accepted and the delivery to me of a copy of said motion, together with affidavit and letter named is acknowledged, this 29th day of March, 1906.

J. H. HAZELRIGG,
Counsel for Henry R. Prewitt, Insurance Commissioner, Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1905.

No. 178.

SECURITY MUTUAL LIFE INSURANCE COMPANY . . . *Plaintiff in Error.*

vs. MOTION.

HENRY R. PREWITT, INSURANCE COMMISSIONER OF THE STATE OF KENTUCKY . . . *Defendant in Error.*

The plaintiff in error, the Security Mutual Life Insurance Company, moves the court for leave to file herein its petition for rehearing and brief, and as a part thereof, files affidavit of Wm. Marshall Bullitt and letter from Henry R. Prewitt, Insurance Commissioner, and asks that said affidavit and letter be read on the hearing of said petition.

WM. MARSHALL BULLITT,

CHAS. S. GRUBBS,

Attorneys for Security Mutual Life Insurance Company, Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1905.

No. 178.

SECURITY MUTUAL LIFE INSURANCE COMPANY . . . *Plaintiff in Error.*

vs. AFFIDAVIT.

HENRY R. PREWITT, INSURANCE COMMISSIONER OF THE STATE OF KENTUCKY . . . *Defendant in Error.*

The affiant, Wm. Marshall Bullitt, says that he is a practicing lawyer, a member of the Jefferson county bar of Louisville, Kentucky, and having been of counsel for the

Security Mutual Life Insurance Company since the institution of the original action in the Jefferson Circuit Court, he is familiar with the several steps taken in the conduct of this case. The affiant says that the questions in issue herein being undetermined on July 1, 1905, and the parties desiring to preserve the status pending the appeal to this court, and the annual tax due to the State of Kentucky being paid, the Insurance Commissioner consented to, and did conditionally, renew the license for one year from July 1, 1905, as shown by letter of Henry R. Prewitt, Insurance Commissioner, dated March 23, 1906, to Grubbs & Grubbs, filed herewith and made part hereof, marked "A."

WM. MARSHALL BULLITT,

Subscribed and sworn to by Wm. Marshall Bullitt, before me this 29th day of March, 1906. My commission expires 6th day of February, 1910.

E. G. NORTON,
Notary Public Jefferson
County, Kentucky.

"A."

March 23, 1906.

Grubbs & Grubbs,
Louisville, Ky.:

Dear Sirs: Yours of the 22d inst., to Judge James H. Hazelrigg of this city, concerning the case of the Security Mutual Life Insurance Company against myself as Commissioner, was this day handed to me by Judge Hazelrigg, and in reply thereto will say that in renewing the license of the Security Mutual Life Insurance Company, I did so with the understanding that the new license should in no way affect the rights of the Commonwealth in the litigation pending between the Commonwealth and the company; I reserved all rights of the Commonwealth to cancel the license at any time. There was no record made at the time of renewing the license. Yours very truly,

HENRY R. PREWITT,
Insurance Commissioner.

NO. 178

In the Supreme Court of the United States

OCTOBER TERM, 1905.

SECURITY MUTUAL LIFE INSURANCE COMPANY, . Plaintiff in Error,

vs.

HENRY R. PREWITT, Insurance Commissioner of the State of Kentucky . . . . . Defendant in Error.

PETITION FOR RE-HEARING.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, the Security Mutual Life Insurance Company, plaintiff in error, respectfully prays for an order directing a re-argument of this cause upon the following grounds:

First.—The absence of any argument whatever, either oral or in any of the briefs, by counsel for either party upon the point on which this court disposed of the case, due to a failure on counsel's part to anticipate that this court would either consider or decide the case upon a ground not raised by counsel.

Second.—The misconception by this court of the issues really involved in the litigation, and an erroneous view of the laws of Kentucky as to the admission of foreign insurance companies to do business within the State, a correct understanding of which demonstrates that the question involved has not become (as this court decided it had) a "moot question," but is still a matter of live and vital moment.

Third.—Because the license granted July 1, 1904, expiring July 1, 1905, was, on that date, in order to prevent injustice to the plaintiff in error renewed, not absolutely, but only conditionally, pending this appeal, for another year, as appears by the letter of the Commissioner of March 23, 1906.

Fourth.—The great practical importance of the decision upon the rights of the plaintiff in error, depriving it of the possibility of relying upon a right guaranteed to it by the Federal Constitution and subjecting it to a destruction of its business in the State of Kentucky without any prospect of relief, and all due not to any lack of diligence on its part, but to the delay of this court in setting the cause down for argument.

Fifth.—Because if the judgment of the Court of Appeals of Kentucky is erroneous, plaintiff in error is entitled to its costs.

Your petitioner respectfully requests an attentive consideration to the annexed brief, wherein the grounds above mentioned are more fully stated and supported, and prays that this cause may be set down for re-argument upon some day to be appointed by the court.

And so your petitioner will ever pray.

F. W. JENKINS,
JULIEN T. DAVIES,
CHAS. S. GRUBBS,
WM. MARSHALL BULLITT,
Counsel for Plaintiff in Error.

I certify that, in my opinion, the foregoing petition for rehearing is well founded.

WM. MARSHALL BULLITT,
Counsel for Plaintiff in Error.

BRIEF IN SUPPORT OF THE PETITION FOR REHEARING.

First Point.

THE ABSENCE OF ANY ARGUMENT WHATEVER, EITHER ORAL OR IN ANY OF THE BRIEFS, BY COUNSEL FOR EITHER PARTY UPON THE POINT ON WHICH THIS COURT DISPOSED OF THE CASE, DUE TO A FAILURE ON COUNSEL'S PART TO ANTICIPATE THAT THIS COURT WOULD CONSIDER OR DECIDE THE CASE UPON A GROUND NOT RAISED.

This court held that this was a suit to compel a restoration of a license; that the life of the license expired by its own terms pending the litigation, and that therefore there was nothing left to litigate about; that you could not compel the restoration of a thing which, by the lapse of time, had ceased to exist. That point was not in any way raised or discussed at the oral argument or in the briefs (for reasons which will be given hereafter), and the court in deciding the case on such a point was deprived of the views of counsel on the subject, and, as will be seen, not unnaturally fell into error as to what this litigation really embraced.

The point was not overlooked or intentionally ignored by counsel, but the counsel for both parties conceived that no such point really existed under the statutes of Kentucky. Should not this court be willing to afford an opportunity to hear counsel on so important a matter?

Second Point.

THE MISCONCEPTION BY THE COURT OF THE ISSUES REALLY INVOLVED IN THE LITIGATION AND AN ERRONEOUS VIEW OF THE LAWS OF KENTUCKY AS TO THE ADMISSION OF FOREIGN INSURANCE COMPANIES TO DO BUSINESS IN THE STATE, A CORRECT UNDERSTANDING OF WHICH DEMONSTRATES THAT THE QUESTION INVOLVED HAS NOT BECOME (AS THIS COURT DECIDED IT HAD) A "MOOT QUESTION," BUT IS STILL A MATTER OF LIVE AND VITAL MOMENT.

This court, in its opinion, said:

> "Section 635,* Kentucky Statutes, provides that these licenses or permits must be renewed *annually* . . . It appears that the laws of Kentucky require the *annual* renewal of the permit to any foreign insurance company, in order that the company may continue to do business in the State, and without such license the company is prohibited from doing any business therein. . . . If the court should now assume to cancel the revocation it could not thereby reinstate the permit, which has already expired and the company would still be without power to do business in the State until another permit should be granted. To adjudge that the old permit remains good until the expiration of the year is to adjudge an abstract question, as no relief can be now awarded concerning it."

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*Evidently a misprint for Sec. 633.

It is thus seen that the court disposes of the case upon the theory that the suit below was one to secure the restoration of the so-called annual license dated July 1, 1904, and that except as acting under such specific one-year license the insurance company had no authority to do business in the State.

That is a radical misconception of the laws of Kentucky on the subject.

The laws of Kentucky do not require the annual renewal of a license to a foreign insurance company in order that the company may continue to do business in the State, and there is no provision in the law for the issuance to a foreign insurance company of an annual permit nor for the renewal thereof; and this court, in holding to the contrary, was misled by the statute (section 633), which provides for the renewal of licenses to *agents* annually.

The law on the subject of the admission of foreign insurance companies is as follows:

It must file with the Insurance Commissioner a resolution consenting to the service of process upon an agent or upon the Commissioner of Insurance. (Ky. Stats., sec. 631); and it shall file with the Commissioner of Insurance a copy of its charter and be possessed of the legal reserve, and when those conditions have been complied with the law is mandatory that the Insurance Commissioner "shall furnish to such agents as the company directs, a license to transact business as agents for said company." (Ky. Stats., sec. 634.) These licenses to agents "must be renewed annually" upon a finding by the Commissioner that the company has complied with the law and has the required reserve (Ky. Stats., sec. 633). If the Insurance Commissioner finds that any foreign insurance company has failed to comply with the law, or is insolvent,

he shall revoke or suspend its authority to do business, and shall notify its agents of such suspension, and they in turn shall notify the policyholders. (Ky. Stats., sec. 753.) The Insurance Commissioner is also required to apply for an injunction restraining the company from further proceeding with its business, and the court may appoint a receiver "to take possession of the property and effects of the company and to settle its affairs." (Ky. Stats., sec. 753.)

It is thus seen that there is no express provision in the law for issuing an annual license to the company, but when it shall have been admitted into the State to transact business the authority to continue within its limits is a continuing one until revoked, and by the principle of "comity" it has the right to continue to do business in the State until expelled.

It is true that as a mere matter of practice the insurance department of the State has been in the habit on the first of July in each year of issuing a so-called certificate to foreign insurance companies, authorizing them to transact business in the State for one year, a copy of which will be found on page 3 of the record. There is no authority of law for the issuance of that certificate. It is superfluous and is a mere matter of administrative convenience. The Commissioner adopted it as his method of making an annual "finding," as required by Kentucky Statutes, section 633, as a condition precedent to the renewal of licenses to agents.

By Kentucky Statutes, section 4226, each insurance company is required, on July 1st of each year, to make a statement of the amounts of its premiums collected and to pay a tax of $2 upon each $100 thereof, and accordingly the certificate referred to is issued as a matter of convenience on that date as a receipt and as evidence that the

company has complied with the law, and it is not issued pursuant to any express or implied authority or requirement of the statutes.

We submit therefore that this court erred in holding that "the laws of Kentucky required the annual renewal of the permit to any foreign insurance company;" that "without such license the company is prohibited from doing business therein."

Indeed, a careful inspection of the petition for the injunction shows that the gist of the case was not to compel a restoration of the mere renewal certificate dated July 1, 1904; for while the certificate is copied into the bill, it is not referred to as the basis or authority of the company to do business, but, on the contrary, the theory of the bill is, that when the insurance company was permitted to enter the State it was entitled to remain there and to continue to transact its business until it was expelled by some affirmative action. Its right to do business did not expire with the expiration of the year for which the so-called certificate was granted. The certificate which is issued each year by the Commissioner is only evidence of the fact that the company had at the time stated complied with all the laws of the State, and can not in any manner add to or take from the authority theretofore exercised by the company to continue to do business indefinitely.

In so far as the certificate is set out in the petition it is a mere formality and is not referred to anywhere else except in that one place, and the action of the Commissioner is not stated to have been a revocation of that certificate or license, but the bill alleges that the Commissioner "revoked the authority of the Security Mutual to do business in the State of Kentucky," which refers not to the mere yearly permit, but to the prior authority which the com-

pany had to do business in the State ever since the year 1900, when it was first admitted.

Kentucky Statutes, sections 572 and 631, are both anti-removal statutes, and are both set out in the petition (Rec. 4). They contemplate an indefinite continuance of business in the State and an absolute revocation of authority upon removal; and when a company has removed a suit, its right to do business in the State is absolutely forfeited, and there is no provision for again admitting it into the State.

In Barron v. Burnside and in Doyle v. Insurance Company, there were provisions in the State statutes for allowing the company to come back into the State after a certain period subsequent to the removal, but in the Kentucky Statutes there is no provision for ever allowing a company to again re-enter the State.

There is another aspect which shows that the questions are not mere abstract questions:

By virtue of the revocation of the license the Insurance Commissioner became entitled, under Kentucky Statutes, section 753, to enjoin the company from further transacting business in the State and to obtain a receiver for all its property and effects in the State and to settle up its affairs.

The bill for an injunction was not only to set aside the revocation, but also to restrain the Insurance Commissioner from enjoining the company from transacting business and from obtaining a receiver of its property and effects. The right of the Insurance Commissioner to obtain a receiver for the property and effects of the company did not expire with the life of the permit, and therefore if this court's opinion shall stand we have the anomalous condition of affairs that the rights of the company have expired so that it can obtain no adjudication from this

court; and yet the questions involved are alive enough to enable the Insurance Commissioner to obtain a receiver for the company. The right of the Insurance Commissioner to a receivership of the company exists only by virtue of the validity of his revocation of its right to do business in the State, and upon the dismissal of this writ of error the Insurance Commissioner is free to have a receiver appointed for the company. That shows that the questions involved in this proceeding are not mere abstract questions, but in that aspect at least are still alive.

Suppose when the mandate of this court is sent down and the supersedeas ceases to be effective, that the Insurance Commissioner should then proceed to ask for a receiver upon the ground that this company's license had been revoked in September, 1904. What defense could the insurance company interpose? It undertook to enjoin him from doing that thing upon the ground that he was infringing a constitutional right. The Court of Appeals of Kentucky has decided that he did not infringe any constitutional right, and the supreme court has dismissed the writ of error on the ground that the question involved was merely an abstract one, and yet, when the case comes back to the State court, it will be perfectly free to grant all the relief that the Insurance Commissioner wants.

We respectfully submit that this court has overlooked one of the most important features involved in this litigation, and it was on account of the full appreciation by counsel for both sides that a mere annual permit was not the basis of the authority of the company to do business in the State that the question was not raised on the oral argument or in the briefs.

Third Point.

BECAUSE THE LICENSE GRANTED JULY 1, 1904, EXPIRING JULY 1, 1905, WAS, ON THAT DATE, IN ORDER TO PREVENT INJUSTICE TO PLAINTIFF IN ERROR, RENEWED, NOT ABSOLUTELY, BUT CONDITIONALLY, PENDING THIS APPEAL, FOR ANOTHER YEAR, AS APPEARS BY THE LETTER OF THE COMMISSIONER OF MARCH 23, 1906.

When the trial court (Gordon, J.) entered the judgment on October 29, 1904, directing the insurance commissioner to cancel his revocation and to grant authority to the plaintiff and its agents to transact the business of life insurance in the State of Kentucky (Rec. 12), the Commissioner obeyed the order of the court and restored to the plaintiff its authority to do business in the State.

On December 5, 1904, the Court of Appeals reversed the judgment of the trial court, but the writ of error sued out from this court operated as a supersedeas and so the matter remained in *statu quo* pending the hearing of the case here.

On July 1, 1905, the company paid its annual tax and it was also necessary for the agents to renew their licenses under Kentucky Statutes, section 633. Inasmuch as the right of the Security Mutual to do business in the State of Kentucky was not based upon the so-called annual permit, the Insurance Commissioner recognized that, if Kentucky Statutes, section 633, was unconstitutional and did not authorize his revocation of its right to do business in the State, it would be a great injustice to hamper the company by refusing to renew the so-called annual permit or by refusing to renew the annual licenses to the agents.

The Insurance Commissioner, in a spirit of fairness which characterizes his whole action in this proceeding, did not wish to destroy the company's business by assuming that its right to do business in the State depended upon the annual renewal of the licenses and thereby escape the operation of the supersedeas by making the technical claim that the renewal of the license did not come within the prohibition of the supersedeas and therefore, on July 1, 1905, in order that the status of all parties might be preserved upon the payment by the company of its annual tax, he renewed the license until July 1, 1906.

The letter of the Commissioner shows that the renewal is conditioned on the action of this court, and that we will be turned out of the State without a decision on the merits of the claim.

We submit a renewal made under such circumstances is a renewed threat of a revocation of the license and of all authority to do business in the State if this writ of error should be dismissed.

While courts decline to decide moot or abstract questions, nevertheless they encourage any action on the part of litigants in real controversies that facilitates the administration of justice (Lord v. Veazie, 8 Howard, 252), and it is in this spirit that the Commissioner issued his renewal conditionally.

Facts which affect the right of the court to proceed or which show that a question has become abstract may be proven by extrinsic evidence. Dakota Co. v. Glidden, 113 U. S., 225, 226; Mills v. Green, 159 U. S., 654; Kimball v. Kimball, 174 U. S., 162; Jones v. Montague, 194 U. S., 147, 153.

The principle which allows the expiration of jurisdiction to be proved dehors the record will permit evidence contradicting an inference that a question is "moot" and therefore we file the affidavit containing the Commissioner's letter.

Fourth Point.

THE GREAT PRACTICAL IMPORTANCE OF THE DECISION UPON THE RIGHTS OF THE PLAINTIFF IN ERROR, DEPRIVING IT OF THE POSSIBILITY OF RELYING UPON A RIGHT GUARANTEED TO IT BY THE FEDERAL CONSTITUTION AND SUBJECTING IT TO A DESTRUCTION OF ITS BUSINESS IN THE STATE OF KENTUCKY, WITHOUT ANY PROSPECT OF RELIEF, AND ALL DUE NOT TO ANY LACK OF DILIGENCE ON ITS PART, BUT TO THE DELAY OF THIS COURT.

A court, especially the Supreme Court of the United States, we take it for granted, is reluctant to refuse to decide a case before it when the question involved is the important claim of the protection of a constitutional provision; and when a litigant specially sets up and claims in a State court some right, privilege or immunity under the Federal Constitution and that right, privilege and immunity is there denied. This Honorable Court, unless the law imperatively demands it, will necessarily hesitate to so dispose of a case so as forever to deprive the litigant of the opportunity to have its right under the Constitution judicially passed upon by the court specially created for that purpose.

The practical effect of this court's decision is this: The Insurance Commissioner did not merely cancel the so-called and superfluous yearly license which this court alleges to have expired on July 1, 1905, but he also "revoked all authority of the Security Mutual" to do business in the State, such revocation being for all *future* time. By the dismissal of this writ of error, the judgment of the State court dis-

missing the bill for an injunction becomes *res judicata;* the seal of approval is placed on the Insurance Commissioner's action in revoking the authority to do business; he is free now to notify all policyholders of such revocation; and he may enjoin the company from further transaction of its business and secure a receiver for its property and effects in this State (Ky. Stats., sec. 753), and all because it removed a case to the federal courts.

This writ of error was filed January 27, 1905; the record was filed in this court February 13, 1905; it was printed at once; a motion to advance, as authorized by statute (U. S. Rev. Statutes, sec. 949), was made in March, 1905, and was denied in April, 1905. In short, the plaintiff in error did all in its power to secure a decision by this court before the expiration of the license, and if the case had then been advanced (as it subsequently was), a decision could have been had before July 1, 1905. Should a litigant be deprived of the opinion of this court on a great question of constitutional right because this court declines to consider the case until it is too late to decide it, and then assigns such delay as a ground for dismissing the writ? If the present opinion be adhered to it would be impossible ever to get the question decided, for no matter how promptly a case were heard below, this court might never decide it before the year expired.

The plaintiff in error, for having removed a case to the federal court, is not only deprived of relief in this court, but its business will be destroyed, and it is at the mercy of the Insurance Commissioner, and all because it exercised a right conferred by the Federal Constitution.

The question raised by this writ of error is therefore not an abstract one at all; the gravest practical results will follow from it, and we respectfully submit that a re-argument should be ordered so as not to foreclose a question on which counsel have not been heard.

Fifth Point.

BECAUSE IF THE JUDGMENT OF THE COURT OF APPEALS OF KENTUCKY IS REVERSED, PLAINTIFF IN ERROR IS ENTITLED TO ITS COSTS.

Aside from the results which may come to plaintiff in error as suggested above, the practical effect of the opinion herein is to put upon plaintiff the costs, at least, in the courts below (Kentucky Statutes, 889). While this court has entire control of costs as well as the merits (Florida Internal Improvement Fund v. Greenough, 105 U. S., 527), ordinarily costs will not be considered in such cases, but in Pennsylvania v. Wheeling and Belmont Bridge Company, 18 Howard, 396 (cited in Mills v. Greene), the court awarded costs to the party who was adjudged to be correct on the main question, where an intervening act had made it impracticable to grant the relief sought in the original bill.

While appreciating the importance of the questions constantly pressing upon this court, we respectfully submit that, as the rule on which this case was decided is not of universal application, if correct in its main contention, the plaintiff in error should not, under the facts shown by this record, be subjected even to the costs.

We respectfully ask a rehearing.

F. W. JENKINS,
JULIEN T. DAVIES,
CHARLES S. GRUBBS,
WM. MARSHALL BULLITT,
Counsel for Security Mutual Life Ins. Co.,
Plaintiff in Error.